Supreme Court, U.S.
F I L E D
MAY 29 2001

No. 00-1568

IN THE

Supreme Court of the United States

SHIRLEY DIETELBACH,

Petitioner,

v.

OHIO EDISON COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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PETITIONER'S QUESTION PRESENTED FOR REVIEW

Whether, on summary judgment review of the " 'qualified' individual with a disability" issue in an ADA action where the medical evidence conflicts with the discharged employee's "I can do my job" testimony, genuine issue of material fact exists where the employer never provided the employee an opportunity to perform her position's essential functions with or without reasonable accommodation.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Ohio Edison Company, is a wholly owned subsidiary of FirstEnergy Corp.

STATEMENT OF THE CASE

In October 1995, Petitioner was employed at a power plant owned by Respondent ("Ohio Edison") as an electrical instrument & test worker — A Classification ("Electrical I&T-A). There are significant physical demands for the I&T-A position involving pushing, pulling, lifting and finger manipulation. Petitioner's responsibilities included installing and repairing electrical and control equipment, and performing rigging work requiring the handling of heavy electrical equipment. Petitioner was injured at work on October 6, 1995 while she was rodding out an ash line at the power plant. Following Petitioner's treatment at an emergency room for complaints of pain in her hands, she was placed on temporary light duty.

Stanley Nahigian, M.D. treated Plaintiff and evaluated her injury throughout 1996. He operated on Petitioner's right hand in April 1996. Following a two month convalescence, Petitioner returned to temporary light duty at the Plant. In August 1996, Dr. Nahigian placed significant physical limitation restrictions on Petitioner, prohibiting her from opening valves or jars, climbing ladders, or lifting more than five pounds. Dr. Nahigian subsequently opined these restrictions are permanent.

None of the light duty tasks performed by Petitioner constituted a full-time job at the Plant. Of the non-management jobs actually existing at the facility, all of them had physical requirements at least as demanding as Petitioner's job as an Electrical I&T-A. When asked what type of work Petitioner could perform, her physician opined:

> **She's done as a factory worker, she's finished. She cannot do anything that has to have powerful thumbs, powerful grip, repetitive lifting and grasping, certainly nothing that ha[s] any kind**

> **of pneumatic tools or any torqueing with heavy screwdrivers or wrenches, anything that would demand where there would be a lot of strain on her thumbs, strain on her hands. The power is gone.**

Dr. Nahigian also opined that Petitioner reached "maximum medical improvement" during her course of treatment in November 1996. Based on his treatment and evaluation of Plaintiff's condition, Dr. Nahigian opined Petitioner's medical condition rendered her incapable of performing the tasks associated with her job as an Electrical I&T-A.

Ohio Edison's medical consultant confirmed the findings and conclusions of Plaintiff's treating physician. Based on the medical evidence, Ohio Edison determined that Petitioner's condition prevented her from performing her job, and the other jobs actually existing at the Plant. The record contains no medical or objective evidence indicating Petitioner is capable of performing the essential functions of her job. It is uncontroverted that Petitioner never requested any accommodation.

Ohio Edison's employment policy required Petitioner's termination because she had achieved maximum medical improvement and could not perform her job. There is no evidence that Petitioner's termination was a result of anything other than the normal application of Ohio Edison's employment policy. Petitioner's termination became effective in January 1997. Petitioner applied for and obtained social security disability benefits after her termination.

Petitioner commenced suit in state court in January 1998. The case was removed to the United States District Court in February 1998. In September 1998, the District Court granted summary judgment in favor of Ohio Edison against Petitioner's

federal ADA claim and a parallel state statutory claim. The summary judgment was affirmed by the United States Court of Appeals for the Sixth Circuit in January 2001.

REASONS FOR DENYING THE WRIT

Petitioner's argument to invoke this Court's jurisdiction is trivial, if not frivolous. The case lacks any issue meriting further review.

Petitioner focuses her attack on the findings now made by two courts that no reasonable fact finder could conclude she is a "qualified individual" under the ADA. Both courts based their findings on the opinions of Petitioner's treating physician, and the fact that these opinions were uncontroverted by medical evidence. Petitioner takes the absurd position that she can create a triable issue as to whether she is a "qualified individual" by simply denying her own treating physician's opinions, baldly asserting that she *is* able to perform the essential functions of her job.

Petitioner's position is similar to the position taken by the Plaintiff in *Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997). In that case, the plaintiff unsuccessfully attempted to demonstrate a triable issue on the question of whether she was a "qualified individual" under the ADA with an affidavit sworn by her psychologist. On review, the Seventh Circuit disagreed, finding that the psychologist's sworn statement regarding plaintiff's ability to return to work constituted ". . . nothing more than a naked conclusion unsupported by any factual foundation". *Id.* at 468. Petitioner's position is no less speculative in this case. Her self-serving assertion is completely unsupported by any factual foundation, leaving a reviewing court with no basis for finding probative value in the assertion.

Contrary to Petitioner's argument, her contention does *not* raise any issue of significance relating to the circumstances under which court should defer to the reasonable medical judgment of private physicians on which employers rely. This case, for example, does not involve a conflict between the employer's physician/consultant and the employee's treating physician. There was complete agreement in this case between Ohio Edison's medical consultant and Petitioner's treating physician. Based on their independent evaluations of Petitioner, they concluded she is incapable of performing the essential functions of her job. Petitioner failed to challenge these conclusions with any medial evidence. This unanimity alone removes any rational basis for a court to second-guess the medical evidence in this case.

Petitioner also is incorrect in suggesting that her argument raises a new or novel issue requiring judicial resolution. One recent case with comparable facts is *Mazza v. Bratton*, 108 F. Supp. 2d 167 (E.D.N.Y. 2000), *affirmed*, __ F.3d __ (2d Cir. 2001) (Table, 2001 WL 363513). In that case, "[p]laintiff maintained that he would have been able to work with only the accommodation of being allowed to use bathrooms as needed". *Id.* at 170. His treating physician opined that plaintiff would be able to resume his previous duties with some accommodations if he responded favorably to the intensive medical therapy he was then undergoing. *Id.* at 172. The district court discounted the probative value of the treating physician, finding that it essentially confirmed the evaluation of the employer physician's that Plaintiff's prognosis was poor. *Id.* at 175. Like Petitioner, plaintiff in *Mazza, supra,* asserted he was able to work at the time in question. *Id.* The district court expressly rejected this assertion, finding that "plaintiff cannot salvage his claim with his bald assertion of a belief that he was able to work at the time, unsupported by any medical or other objective evidence". *Id.*

The rationality of the outcome in *Mazza*, *supra* — and in this case — is readily apparent. Petitioner essentially is arguing that the employer should accept her self-serving, unsubstantiated assertion over the opinions of her own treating physician, completely disregarding the objective medical evidence. Petitioner's reasoning defies common sense. If Petitioner's position were the rule, there would be no reason to have medical evaluations for an injured employee; so long as the employee claimed to be able to perform her job, then she would be permitted to proceed with her tasks regardless of safety. Plainly, this would lead to disastrous consequences in many instances. Petitioner's proposal allowing injured employees to overrule their treating physician's opinions also would lead to increased volumes of frivolous cases as the employee claiming a remedy under the ADA could always establish she is a "qualified individual" by merely denying the opinion of her treating physician.

Petitioner claims her goal is to find a "fair and pragmatic method" for resolving disputes between injured employees and their treating physicians. In fact, the only reason Petitioner is attempting her nonsensical quest is to evade summary judgment.

CONCLUSION

For these reasons, the Court should deny certiorari.

Respectfully submitted,

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